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No. 435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

HARRIS TRUCK LINES, INC., A Corporation,
Petitioner,

vs.

CHERRY MEAT PACKERS, INC., A Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

	PAGE
Opinion Below	1
Questions Presented	1
Statement	2
Reasons for Denying Certiorari	4
I. The Court of Appeals Decision is Distinctly Correct	4
II. There Are No Special and Important Reasons For Granting the Writ	11
Conclusion	11
Appendix I	
Motion filed July 13, 1961	1a

CITATIONS

Cases:

Brainard v. Joy Mfg. Co., 9 FRD 625 (M.D. Ohio 1949) 8

Creedon v. Smith, 8 FRD 162 (N.D. Ohio 1948) 8

Credit Company v. Arkansas Central Railway, 128 U.S. 261 9

Deena Products Co. v. United Brick & Clay Workers of America, et al., 195 F. 2d 612 (6 Cir., 1952) 6

Edwards v. Doctors Hospital, 242 F. 2d 888 (2 Cir. 1957) 9

Felton v. Florida East Coast Ry. Co., 8 FRD 232 (S.D. N.Y. 1948) 9

Howard v. Local 74, Etc., 208 F. 2d 930 (7 Cir. 1953) 6, 8, 10

Marten v. Hess, et al., 176 F. 2d 834 (6 Cir., 1949) 4, 7

PAGE

Mosier v. Federal Reserve Bank of New York, 2 Cir., 132 F. 2d 710 4

North Umberland Mining Co. v. Standard Acc. Ins. Co., 193 F. 2d 951 (9 Cir., 1952) 10

Old Nick Williams Co. v. United States, 215 U.S. 541 (1910) 5

Plant Economy, Inc. v. Mirror Insulation Co., Inc., (3 Cir.) 308 Fed. 2d 275, 278 10

Ray, et al. v. Morris, et al., 170 F. 2d 498 (7 Cir., 1948) 4

Rice v. Sioux City Cemetery, 349 U.S. 70, 74 11

Waddell v. Chicago Land Clearance Commission, 207 F. 2d 748 (7 Cir., 1953) 9

Wagoner v. Fairview Consolidated School District No. 5, 289 F. 2d 480 (10 Cir., 1961) 9

STATUTES.

28 U.S.C.A. Secs. 46 (a) to (d) 3

RULES.

Federal Rules of Civil Procedure

Rule 5 ..... 8, 9

Rule 6 (b) 11

Rule 73 (a) 1, 8, 10

Rule 77 (d) 8, 9

MISCELLANEOUS.

Rule 4 (a) and (b), Rules of the United States Court of Appeals for the Seventh Circuit 3

Supreme Court Rule 19 (1) 11

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To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is now reported at 305 F. 2d 609.

Question Presented

Assuming *arguendo* the existence of a question, a fair statement of it would be whether a District Court has jurisdiction to extend the time for appeal under Rule 73 (a), F.R.C.P., when there was no showing of excusable neglect based on the failure of a party to learn of the entry of a judgment.

STATEMENT

Petitioner's epitomic version of the facts leaves considerable to be said with regard to the background of the case as it appears from the record before the District Court, upon which it granted the challenged extension.

Petitioner, Harris Truck Lines, Inc., filed its Complaint in the U. S. District Court, Northern District of Illinois, against Cherry Meat Packers, Inc., alleging that certain freight charges were due and owing to it as a result of certain shipments. (A. 1-3). Respondent, Cherry Meat Packers, Inc., filed its Answer and Counter-Claim denying the allegations of the Complaint and alleging that Petitioner was negligent in failing to provide "adequate refrigeration" during the transportation of 26040 pounds of meat and claimed damages therefor. After a trial before the Court, without the intervention of a jury, the Court took the case under advisement and requested the respective parties to submit briefs and suggested findings of facts and conclusions of law. The District Court dismissed the Complaint and rendered judgment for defendant on its Counterclaim. Petitioner's timely filed motion for new trial was denied on June 28, 1961. (A. 214)

On July 13, 1961, Judge Hoffman of the District Court, sitting in emergency during the summer recess, upon the unverified motion of Petitioner's attorney of record, and over the objection of the Respondent entered an order extending the time within which Respondent may file a Notice of Appeal to August 11, 1961. (*Appendix B. Petition, pp. 28-30*)

Petitioner filed its Notice of Appeal on the last day of the extended time. (A. 217)

Respondent moved in the Court of Appeals to dismiss Petitioner's appeal pursuant to 15 (f) of the Rules of that Court, predicated on the grounds that (1) the Notice of Appeal was not timely filed and (2) that the order of the District Court entered July 13, 1961 purporting to extend the time within which Petitioner could file its Notice of Appeal was inefficacious because the District Court had no basis for its jurisdiction to extend the time for filing the Notice of Appeal. Petitioner's brief in opposition to the Motion to dismiss the appeal had attached thereto the affidavits of Jack Goldsmith and Harold Mendenhall. (*Appendices C & D Petition pp 31 to 36*) The matters and things therein alleged were not brought to the notice of the District Court at the time of motion for the extension of time. The District Court had before it only an unverified motion of the attorney of record requesting an extension of time within which Petitioner may file its Notice of Appeal "because Jack Oliver Goldsmith, co-counsel in Los Angeles, went on vacation to Mexico before he learned of Judge La Buy's denial of plaintiff's motion for new trial herein, and Mr. Goldsmith will not return to his office until July 21, 1961." (Appendix I, *infra*, p. 1a).

On January 31, 1962, one judge, the Hon. Latham Castle, entered an order denying the motion to dismiss the appeal and ordered respondent to file its brief on the merits in thirty (30) days. (*Appendix A, Petition p. 27.*)

An order denying a motion to dismiss an appeal is not *interlocutory* but final. A quorum is necessary for such a disposition. *28 U.S.C.A. § 46 (a) to (d) Rule 4 (a) and (b); Rules of the United States Court of Appeals for the Seventh Circuit.* Accordingly, at the oral argument, Chief Judge Duffy so advised counsel for petitioner. The judge

ment of the Court of Appeals dismissing the appeal was entered on May 10, 1962. The Petition for rehearing was denied on June 21, 1962. (303 F. 2d 609).

REASONS FOR DENYING CERTIORARI

I.

THE COURT OF APPEALS DECISION IS DISTINCTLY CORRECT.

Where the statutes prescribe the time within which the decisions of a lower court may be appealed, the reviewing courts have appellate jurisdiction over only those causes in which the appeal is perfected within the statutory period.

The Seventh Circuit applied the above principle to the 30 day period permitted by Rule 73(a) in dismissing the appeal in *Ray, et al.* v. *Morris, et al.*, 170 F. 2d 498, holding:

> "To be sure, rules of practice and procedure are devised to promote the ends of justice and should be liberally construed, but the courts have repeatedly held that an appeal is granted to the losing party on condition that he complies with the statute permitting an appeal; that an appellant must be held to have known of the existence of the statute; and that the requirements of the statute are jurisdictional and cannot be avoided. *Mosier* v. *Federal Reserve Bank of New York*, 2 Cir. 132 F 2d 710."

Similarly, in *Marten* v. *Hess, et al.*, 176 F. 2d 834, 835 (6 Cir., 1949), the court relied upon Rule 73 (a) in dismissing an appeal filed after the 30 day period, on the ground that:

> "It is fundamental that the time requirement within which an appeal must be taken is mandatory and

jurisdictional. It cannot be extended by waiver, or order of the court. If notice of appeal is not filed within the time provided, the right to appeal is lost. • • •"

Courts have no power to extend the statutory period within which an appeal may be taken, except insofar as the statute itself may permit them to do so. In *Old Nick Williams Co.* v. *United States*, 215 U.S. 541, an appeal was dismissed on the grounds relied upon by Respondent. This Court holding as follows:

"As Mr. Justice Bradley said in *Credit Company* v. *Arkansas Central Railway*, 128 U.S. 261:

> 'An appeal cannot be said to be "taken" any more than a writ of error can be said to be "brought" until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the appellate court.'

"There the appeal was allowed by Mr. Justice Miller on the last day on which an appeal could be taken (Revised Statues, §1008), but was not presented to the court below nor filed with the clerk until five days after the prescribed time had expired. It was held that the appeal must be dismissed, and Mr. Justice Bradley added:

> 'The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter.'"

• • •

"The delay in the present case in taking out the writ of error was not the act of the court, but of

> plaintiff in error. At all events, plaintiff in error might have brought its writ of error within the time prescribed by statute, and the court had no power to allow it after the time limited had expired."

In *Deena Products Co. v. United Brick & Clay Workers of America, et al.*, 195 F. 2d 612, 613 (6 Cir., 1952) the District Court had attempted to allow more time than the 30 days authorized by Rule 73 (a) for perfection of the appeal, but the Court of Appeals held that it had no jurisdiction, stating:

> "• • • it appears that this court has no jurisdiction to entertain the appeal, for the reason that the appellant company failed to file a notice of appeal in the United States District Court within the time prescribed by law and by the Rules of Civil Procedure, inasmuch as more than thirty days had elapsed after the motion of appellant for a new trial had been overruled by the District Court before the appellant's motion for a new trial was reinstated and again overruled, the District Judge having stated that his purpose in setting aside the original order overruling the motion for a new trial was to enable the plaintiff to prosecute an appeal;
>
> "And it being the view of this court that, both under Civil Procedure Rule 73 (a), 28 U.S.C.A., and section 2107 of Title 28 U.S.C., as amended by Act of Congress of May 24, 1949, the filing of a notice of appeal within the prescribed time is mandatory and jurisdictional and cannot be extended by waiver or order of court, and the right to appeal is lost if notice of appeal is not filed within the time prescribed."

In *Howard v. Local 74, Etc.*, 208 F. 2d 930, the facts were these.

The defendants-appellees moved to dismiss the appeal on the ground (among another) that plaintiffs' notice of

appeal filed pursuant to an order of the District Court was "inefficacious because the court had no jurisdiction to extend the time for filing such notice."

The plaintiffs had brought their action on behalf of themselves and others similarly situated seeking injunctive and other relief against an alleged conspiracy of defendants in violation of the Sherman Anti-Trust Act. The complaint was dismissed on July 20, 1953. Plaintiffs filed a Notice of Appeal from the Order of Dismissal on August 21, 1953, thirty-two (32) days after entry of the judgment. Thereafter plaintiffs filed a Motion with the trial Court for leave to withdraw their Notice of Appeal previously filed and for an extension of time for filing another Notice of Appeal to September 16, 1953. On the latter date, plaintiffs' Motion was granted, the original Notice of Appeal withdrawn and a second Notice of Appeal filed. The only question before the Court was whether the Court below had jurisdiction to enter the Order of September 16th. The late Judge Lindley, speaking for the Court in dismissing the appeal, stated at Page 932:

> "Thus, it is clear that a lower Court has jurisdiction to extend the time for appeal only if a basis for that jurisdication is found within the express provisions of Rule 73 (a); *viz.*, a showing of "excusable neglect based on a failure" of a party to learn of the entry of the judgment. The Courts have repeatedly held that compliance with the requirements of a Statute permitting an appeal is jurisdictional, and that an extension of time may be granted only on satisfaction of the statutory provisions therefor (citing cases). As the Court of Appeals for the Sixth Circuit said in *Marten* v. *Hess*, 176, F. 2d 834, at page 835, "It is fundamental that the time requirement within which an appeal must be taken is mandatory and jurisdictional. It can not be extended by waiver, or order of the Court. If notice of appeal is not filed within the time provided, the right to appeal is lost."

Upon the question of "a showing of excusable neglect of a party" the court stated at page 933:

> "As previously noted, a lower court may not extend the statutory time for taking an appeal, except insofar as the statute itself empowers it to do so and an extension is permissible under Rule 73 (a) on a showing of "excusable neglect" only. No such showing was made here. • • •
>
> Furthermore, the record discloses no failure of any interested party to receive notice of the entry of the order dismissing this complaint. Rule 77 (d) requires the clerk to serve notice of the entry of an order or judgment, by mail, on all parties not in default by failure to appear. A docket entry of July 20, 1953, by the Clerk of the Court below, establishes the fact that notice of the judgment of that date was mailed to plaintiffs' counsel on July 21st, which, under the provisions of Rule 5, is tantamount to service on plaintiffs. • • • (citing case.)
>
> • • • Under Rule 5 notice to counsel is notice to all parties represented by him.
>
> For the foregoing reasons, we hold that no "excusable neglect," within the exception provided in Rule 73 (a), is shown and that the appeal should be dismissed for want of jurisdiction."

There is only one ground upon which a District Court may rely in extending the time for notice of appeal, and that is "excusable neglect based on a failure of a party to learn of the entry of the judgment." (Rule 73 (a)). The cases applying the plain language of Rule 73 (a) hold that only "failure of a party to learn of the entry of the judgment" will be accepted as the basis for extending time to appeal. *Howard* v. *Local 74, Et .*, 208 F. 2d 930 (7 Cir., 1953); *Brainard* v. *Joy Mfg. Co.*, 9 FRD 625 (M.D. Ohio, 1949); *Creedon* v. *Smith*, 8 FRD 162 (N.D. Ohio,

1948); *Felton* v. *Florida East Coast Ry. Co.*, 8 FRD 232 (S.D. N.Y. 1948). See also *Waddell* v. *Chicago Land Clearance Commission*, 206 F. 2d 748 (7 Cir. 1953); *Wagoner* v. *Fairview Consolidated School District No. 5*, 289 F. 2d 480 (10 Cir., 1961) and *Edwards* v. *Doctors Hospital*, 242 F. 2d 888 (2 Cir., 1957).

Rule 77 (d) requires the District Court Clerk immediately to mail notice of the entry of every judgment to "every party affected thereby" and to make a note in the docket of the mailing. This was done in this case, as the Petitioner admits. (Petition; p. 4)

Clearly, therefore, the order of July 13, 1961 went beyond the jurisdiction of the District Court, insofar as it purported to authorize petitioner who had learned of the entry of the order denying the motion for new trial in ample time, to file a notice of appeal more than thirty days after the final judgment was entered.

Rule 77 (d) FRCP provides in part as follows:

> "• • • *Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a).*"

Rule 5, referred to in Rule 77 (d), includes the following provision:

> "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the Court."

Clearly, therefore, the fact, that the District Court clerk mailed copies of the June 28, 1961 order to Petitioner's

counsel of record is determinative that Petitioner had knowledge of that order, there being nothing in the record to the contrary. *North Umberland Mining Co.* v. *Standard Acc. Ins. Co.*, 193 F. 2d 951 (9 Cir. 1952).

Petitioner was represented by counsel, and the clerk mailed notice of the order entered on June 28, 1961 to him on June 28, 1961. There could not have been a failure of a party to receive notice of the order, within the meaning of the Rules. Accordingly, the District Court had no power under Rule 73 (a) to extend petitioner's time to file its notice of appeal. With this the Court below agreed.

Petitioner's plaint about liberal construction of the Federal Rules of Civil Procedure is adequately answered in a very recent unreported case.

Chief Judge Biggs, in dismissing an appeal for lack of jurisdiction in *Plant Economy Inc.* v. *Mirror Insulation Co., Inc.* (3 Cir.) 308 Fed. 2d 275, 278, stated pertinently:—

> "We recognize that the Federal Rules of Civil Procedure must be construed liberally to bring about a just, speedy and inexpensive determination of every action. Any requirement of compliance with barren technical formalities is to be avoided. But it cannot be denied that certain formalities are indispensable if litigation is to be just, speedy and inexpensive. This fundamental and most important objective can be achieved only by adherence to rather than rejection of the rules . . .
>
> Since notice of appeal was not filed until after the expiration of thirty days from the entry of the judgment appealed from, and no *effective* action was taken in the Court below to extend the appeal period, we do not possess the power to entertain the appeal."

Petitioner contends "that the District Court has a broader discretion in granting such motions for extension during the period initially prescribed for filing the Notice of

Appeal than it does after the expiration of the 30 day period for filing a Notice of Appeal. This same distinction is made by Rule 6(b), F.R. Civ. P." (Petition p. 11)

Rule 6(b) itself and the decisions of Courts are to the contrary.

The time limitation for perfecting an appeal is expressly excluded from the general provisions of Rule 6(b) for enlargement of time "for cause shown" for actions "required or allowed to be done" within an express time limitation set by the Federal Rules or by order of a Court. *Howard v. Local 74, etc.*, 208 F. 2d 930, 932.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

Rule 19 (1) of this Court states emphatically that a review is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor. Special and important reasons imply a reach to a problem beyond the academic or the episodic. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74.

Certiorari, if granted here, would be for the sole interest of petitioner and would be an imposition, we believe, on this Court's time for consideration of those classes of cases the adjudication of which is this Court's chief function.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. KELLY, JR.,
Attorney for Respondent.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

HARRIS TRUCK LINE, INC.,
Plaintiff.
vs.
CHERRY MEAT PACKERS, INC.,
Defendant.
No. 57 C 659

MOTION.
(Filed July 13, 1961)

Now comes plaintiff, Harris Truck Line, Inc., and moves this court to extend to Monday, August 28, 1961, the time within which plaintiff may file its Notice of Appeal. This extension is requested because Jack Oliver Goldsmith, co-counsel in Los Angeles, went on vacation to Mexico before he learned of Judge LaBuy's denial of plaintiff's motion for new trial herein, and Mr. Goldsmith will not return to his office until July 21, 1961.

Harris Truck Line, Inc.,
By: /s/ Donald MacKay
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